Filed 2/3/05 Deana A. v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DEANA A.,

Petitioner,

v.

THE SUPERIOR COURT OF THE COUNTY OF SAN BERNARDINO,

Respondent;

SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES,

Real Party in Interest.

E037055

(Super.Ct.Nos. J191991, J191992)

OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Robert G. Fowler, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition denied.

Michael C.P. Clark for Petitioner.

No appearance for Respondent.

Ronald D. Reitz, County Counsel, and Phebe W. Chu, Deputy County Counsel for Real Party in Interest.

Petitioner Deana A. is the mother of V.B., who is almost 13 years old, and B.B., who is nearly 11 years old. Mother filed this writ petition pursuant to California Rules of Court, rules 38 and 38.1[1] challenging an order setting a Welfare and Institutions Code section 366.26[2] permanency planning hearing as to the children. Mother contends that she was not provided with reasonable reunification services. For the reasons provided below, we reject Mother's challenge and deny her petition.

I

FACTUAL AND PROCEDURAL BACKGROUND

On November 28, 2003, V.B. and B.B. came to the attention of the San Bernardino County Department of Children's Services (DCS) when a social worker received an immediate-response referral from the sheriff's station. On that day, the boys were brought to the sheriff's station by their paternal uncle after V.B. reported that his father (Father) had physically beaten him approximately eight weeks earlier when Father learned that V.B. had stolen money. Father had punched V.B. in the face and leg with a fist and kneed him in the stomach, while B.B. watched. The boys reported a fear of their

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[1] The petition for extraordinary writ and the response reference California Rules of Court, rule 39.1B. The rules were changed, however, effective January 1, 2005, and the provisions of rule 39.1B are now set forth in rules 38 and 38.1. We therefore construe the petition to have been filed pursuant to rules 38 and 38.1.

[2] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

father's temper; V.B. stated that he did not disclose the incident before because he did not trust anyone but his aunt and uncle, who were forbidden until that date to contact or see the boys. The paternal aunt and uncle had cared for the boys for as long as a year at a time while Father was in and out of jail. Father admitted to beating V.B. as a form of discipline and stated his sister and brother-in-law could have the boys. Father and the boys reported that Mother's whereabouts were unknown and that Mother had been out of the boys' lives for several years.

On December 2, 2003, DCS filed section 300 petitions on behalf of the children alleging that Mother and Father failed to protect the children (§ 300, subd. (b)); that Mother's whereabouts were unknown (§ 300, subd. (g)); and that Father physically abused V.B. thus placing his brother B.B. at a risk of similar harm (§ 300, subd. (j)).

At the December 3, 2003, detention hearing, Father was present, but Mother was not. The court found a prima facie case for detention of the boys out of the home, ordered the boys removed from their parents' care and custody, and placed them with the paternal aunt and uncle. The matter was then continued to December 22, 2003, for a combined jurisdictional/dispositional hearing.

In a jurisdictional/dispositional report filed on December 17, 2003, the social worker recommended that the allegations in the petition be found true and that family reunification services be provided. As to Mother, the social worker noted that B.B. did not appear to have any memories of his mother. V.B. reported that he had not seen his mother in seven years and stated that he did not like Mother's Day because it made him

unhappy. The boys appeared to be very close to their aunt and uncle and had few memories about their mother. As to Father, the boys were very afraid of their father and did not want to return to his home due to his anger problem. Father also had a history of incarcerations for drug-related offenses.

In an addendum report filed on December 18, 2003, the social worker reported that Father stated that he did not want to participate in reunification services and that he would like his paternal rights terminated. Father also asserted that he did not want to have visits with his children and that he did not want to associate with his sister or his children. The social worker therefore recommended that Father's paternal rights be terminated and a concurrent plan for legal guardianship with the paternal aunt and uncle be implemented.

At the December 22, 2003, jurisdictional/dispositional hearing, Father signed a waiver of rights and a waiver of reunification services form. Mother was not present, and the court found by clear and convincing evidence that reasonable efforts were made to locate Mother and those efforts were unsuccessful. V.B. and B.B. were then declared dependents of the court pursuant to section 300, subdivisions (b) and (g), and maintained in the paternal aunt and uncle's home. Reunification services were neither ordered for Father due to his waiver, nor for Mother as her whereabouts were unknown. The matter was then continued to April 22, 2004, for a section 366.26 hearing.

In an interim review report filed January 20, 2004, the social worker reported that the children had expressed a desire to remain with their aunt and uncle, that the aunt and

uncle had stated their desire to become legal guardians of the boys, and that the aunt and uncle had been approved as caretakers for the boys. Mother's whereabouts still continued to be unknown.

In an adoption assessment report filed on March 4, 2004, the social worker reported the boys' health, emotional well-being, behavior, and schooling. Both V.B. and B.B. were described as healthy, outgoing, well-spoken boys who were responsible and doing well academically. They were both in counseling to deal with grief, loss, and adoption issues. The social worker also noted that both boys, who had been living with their aunt and uncle off and on for over the past seven years, had a significant emotional attachment to the aunt and uncle and that the aunt and uncle had a supportive and loving parent-child relationship with the boys. The boys had expressed a strong desire to be adopted by their aunt and uncle.

In a section 366.26 report filed on April 9, 2004, the social worker noted that Mother's whereabouts had been discovered. On April 1, 2004, the social worker had contacted Mother, who had been residing in Montana, and spoke with her. Mother stated that she had not seen V.B. and B.B. since approximately 1996; that she had attempted to find the boys over the years; and that Father had moved and taken the boys so that she would not be able to locate them. Mother reported that she had remarried and had four other children and that she was contesting the adoption and would be at the April 22, 2004, hearing.

Mother was present at the April 22, 2004, section 366.26 hearing and was appointed counsel. The court ordered DCS to assess Mother for visitation and authorized the social worker to allow Mother weekly supervised visits. The matter was then continued to May 13, 2004 for a further section 366.26 hearing.

At the further section 366.26 hearing on May 13, 2004, the court noted that the parties had reached an agreement. DCS offered Mother six months of reunification services; the next hearing would be deemed the 12-month review hearing pursuant to section 366.21, subdivision (f); and DCS had 30 days to submit a reunification case plan. The parties also agreed that, in light of Mother's extended absence from the children's lives and Mother's residence in Montana, Mother would be permitted weekly telephone and letter visits with the children, and once a month supervised face-to-face visits at Mother's expense and with the children's consent in a therapeutic setting to help the children address their feelings of separation. Mother was in agreement with that visitation order. The section 366.26 hearing was thereafter vacated, and the section 366.21, subdivision (f) hearing was set for November 10, 2004.

On July 21, 2004, at a nonappearance review hearing, the social worker submitted Mother's reunification plan to the court, which was approved. The social worker indicated that on July 13, 2004, Mother had been given referrals for counseling, parenting classes, and drug testing. The social worker also noted that Mother's husband, Tim A., screamed in the phone for approximately 15 minutes while the social worker spoke with Mother. Tim yelled profanities in the immediate presence of Mother's four other

children, made threats, and questioned why Mother had to take classes. Among other inappropriate statements, Tim yelled in the telephone, "The way you [Mother] doing this is fucked. I would go out there and blow up half the fucking state, if it was me. Yeah, I'm pissed. And I don't care who knows it. I'll say the same thing in court. I don't fucking care. I speak my mind." The social worker opined that though Mother had been provided with reunification services, given the facts of this case; Mother's absenteeism from the children's lives for over eight years; the recent home study assessment of Mother's home in Montana; and the July 13, 2004, telephone call with Mother where her husband used profane discourse in the presence of her other children, the recommendation would "most likely remain for the children to be adopted by their aunt and uncle." The social worker also noted that the children had been in the adoptive home where the aunt and uncle have been nurturing, parental figures to the children for most of their lives and that the aunt and uncle continued to be devoted to providing V.B. and B.B. with a loving and stable home life. The aunt and uncle had provided the boys with a private education, extracurricular activities, vacations, a wholesome loving family, and outside counseling and therapy where they could process their abandonment, grief, and loss issues. The children had again expressed a desire to be adopted by their aunt and uncle, whom they loved and to whom they were attached; and the aunt and uncle, who desired to adopt the boys, had expressed that the children could have communication with their biological parents as long as these communications caused no undue harm to the children.

Between May 30, 2004, and June 3, 2004, the social worker had conducted a complete assessment of the current circumstances at Mother's residence in Libby, Montana. Mother had four other children: two from her current husband - T.A. (age 5) and M.A. (age 2); and two from her previous husband who was deceased -- D.H. (age 8) and E.H. (age 7). The family rented a home with two bedrooms, a loft, a small kitchen, one bathroom, and a basement. The family had a limited amount of money and often took advantage of the natural resources, i.e., fish, for food. Mother had received minimum wage as a certified nurse's aide and worked at night. Mother's husband Tim did not work and was a full-time caretaker for the children; however, it did not appear that he took adequate care of the children. Tim often woke up past noon, and D.H. often took care of the younger children. The children had reported that Tim was usually at the bar until the "wee" hours of the morning. Mother and Tim denied that Tim had an alcohol problem.

Mother had left the area some eight years earlier, and her boyfriend at the time would not allow her to see V.B. and B.B. She thereafter lost contact with the children. She also asserted that she had tried to locate the boys about two years ago without success and that she wanted to reunify with the boys, but her primary goal was to be the children's friend, and she would not push them to do something they did not want. She further noted that she wanted to visit with the boys, wanted her letters to be given to the boys, and was willing to participate in reunification services.

After the social worker returned from Montana, she spoke with V.B. and B.B. V.B. stated that he was glad that he met his mother, but that he did not want any further contact with her, including letters. B.B. was undecided about future visits. Both boys again stated that they wanted to be adopted by their aunt and uncle.

On August 6, 2004, Mother filed a section 388 petition, requesting that the court order DCS to facilitate visitation between Mother and the boys in a therapeutic setting, consistent with the desires of the children, because she believed at least one of the boys had expressed a desire to visit with her.

In an interim review report filed on August 25, 2004, the social worker responded to Mother's allegations in the section 388 petition. The social worker noted that to date neither V.B. nor B.B. had expressed a desire to visit with their mother even after being asked numerous times if they wanted to see her. When asked, V.B. had stated that he did not want to visit with his mother; B.B. had stated that he did not know if he wanted to visit with his mother. The children had not given their consent to have a visit with Mother. The social worker further noted that, as the children had not asked for any visits with Mother, DCS was not going to force them to have visits with Mother. The social worker also explained that since the time of the boys' one visit with Mother in May 2004, both children's therapy sessions had doubled each week because they had suffered an increase in issues of abandonment and betrayal. The social worker also noted that some of Mother's letters to V.B. and B.B. had been highly inappropriate, and DCS had not given the letters to them. For example, one letter had expressed pleading and sense of

urgency for the boys to write or call Mother, and all of the letters went into great detail about how wonderful her other children are and how well they are doing. The social worker opined that given the facts that the children had looked to their aunt and uncle for stability and support, their great attachment was to the relative caretakers, and Mother's long absence, it was not in the children's best interests to force them, against their will, to see Mother. The social worker believed, in fact, that it would be detrimental to force the children to visit with Mother.

V.B. and B.B.'s therapist also wrote a letter, dated August 9, 2004, confirming that the boys were in treatment for their "ongoing ordeal of processing the sense of loss, betrayal, and abandonment by their parents." The therapist wrote: "V.B. denied that he is angry at his mother and father for abandoning him and states that he never wants to see them again. B.B., on the other hand, is torn between still wanting and needing the love of his biological father and mother and the pull of the love and attention he receives from his current family."

On August 26, 2004, Mother's section 388 petition was heard. Minors' counsel pointed out that the boys did not want any visits with Mother; that they had been provided with Mother's phone number, which had been posted where they could easily access it at anytime without asking; and that the children had agreed that if their position changed, they would let their aunt, the social worker, or their counsel know. Minors' counsel further noted that the boys had been interrogated enough about what they wanted and their position had not changed. After hearing arguments from counsel, the court

denied Mother's section 388 petition. The court ordered that the children were not to be questioned any more about whether or not they wanted to visit, and a visit was to occur only if the children initiated the request to visit. The court also found that written contact by Mother was detrimental to the children, and it was ordered terminated.

In a status review report filed on November 4, 2004, the social worker recommended that reunification services be terminated and that a section 366.26 hearing be set. Mother had been referred to counseling, parenting classes, and drug testing; she had participated in counseling but had not taken a parenting class and had not drug tested. Mother had continued to demand visits with V.B. and B.B. and wrote to the social worker requesting that the children be forced to see her. However, V.B. and B.B. had continued to refuse to visit Mother. The boys had been adamant in their wish to remain with, and be adopted by, their aunt and uncle. The social worker opined that it would be detrimental to return V.B. and B.B. to Mother, whom they did not know, in light of the children's stated concerns and preferences.

The section 366.21, subdivision (f) contested 12-month review hearing was held on December 1, 2004. Mother testified that DCS sent a social worker to her home in Montana in June and provided her with referrals in the local area and that she began counseling a couple of months later, which was paid for by DCS. Mother also stated that she was referred to a parenting class located in her town and that she had about three or four telephone conversations with the social worker. Mother admitted that during one of her telephone conversations with the social worker her husband Tim was angry and

yelling profanities in the background because he was "pissed" that Mother had to undergo counseling. Mother denied that her current relationship involved domestic violence but admitted that two of her prior relationships had.

Mother also testified that she was not asking that V.B. and B.B. be taken from their current home, because she understood that they were attached to their aunt; she was only asking to be part of their lives so that "they can get to know [her] all over again." Mother further explained, "Well, I want to build a relationship somehow, if I can, with them. And then maybe sometime down the road, like years or something, you know, they could come up for a visit or something, just to see what it's like. I'm not asking for them to be taken from anybody. I just want to be part of their lives; that's all I'm asking." Mother also stated that she was not asking that the children be forced to pursue a relationship with her and that for the most part she had accepted the boys' wishes.

Mother acknowledged that a letter from her therapist indicated that Mother had limited insight into her past behavior that lead to the loss of custody of her boys. When Mother was asked why she had been absent from her sons' lives for so many years, she stated that her ex-husband, the father of her two middle children, would yell, hit, and threaten her anytime she mentioned her sons; she explained that she did not have a driver's license at the time, and he would not take her to get one, and "[t]hat's probably how I lost contact with them." Mother had been receiving services for over six months, but asked for an additional six months so that she could gain a "better outlook on what is

going on" and be able to see, talk with, and write to her sons. Mother admitted she had agreed that she would receive no more than six months of services.

In closing argument, Mother's counsel requested an additional six months of services, though counsel agreed that Mother had received all of the referrals from DCS, and indicated that Mother was not asking the court to make a finding regarding reasonableness of services. Counsel acknowledged that the overriding issue in this case was the wishes of the boys, and as reflected in their therapist's letter, the boys did not want to see their mother. Counsel noted that Mother had consistently requested visitation and that she had accepted the current visitation order and the feelings of her boys. Pointing out that Mother was not seeking to remove the boys from their current home, counsel reiterated Mother's request for additional time for Mother to establish a relationship with her sons, asking for "some sort of contact, whether it be telephonic, in person or through letters."

Minors' counsel responded that Mother could still continue with her counseling without having services granted by the court and that an additional six months of services in this case would be detrimental. Counsel for DCS requested that services be terminated and that a section 366.26 hearing be set. County counsel replied that returning the children to Mother's care would be detrimental to them and that additional services in this case were unwarranted; as Mother's counsel conceded, services had been reasonable, and there was not a substantial likelihood the children would be returned to Mother's care and custody if given additional time.

After reviewing all of the evidence and hearing the testimony, the juvenile court stated that it could only offer Mother an additional six months of reunification services if it could find that Mother had frequently visited the children and had made substantive progress in the programs or services offered and that there was a likelihood of return of the children within the statutory period, "none of which the court can fine today." The court explained, "That's the problem, that there's been a number of years that the children have been away from mom. There is no way that I can say [that] any amount of services would be amenable to allowing these children to reunite with the mother in the time frame. I think mother has recognized that in her statement today. [¶] I'm not going to change the visitation order. If the boys want to visit at their request I'll allow that. But this is something that's going to take years for them to decide that they want to see their mother."

The court then found by clear and convincing evidence that Mother had failed to complete her court-ordered treatment plan, that DCS had made reasonable efforts to make it possible to return the children, and there was not a substantial probability that the children could be returned to Mother's care within the statutory time frame. The court thereafter terminated reunification services and set the matter for a section 366.26 selection and implementation hearing. On December 3, 2004, Mother filed a notice of intent to file a writ petition pursuant to California Rules of Court, rules 38 and 38.1.

II

DISCUSSION

Mother contends she was not provided with reasonable reunification services, primarily because the visitation order was contingent upon the consent of the children. We disagree.

Initially, we find Mother waived this issue on appeal by failing to object below. "Many dependency cases have held that a parent's failure to object or raise certain issues in the juvenile court prevents the parent from presenting the issue to the appellate court. [Citations.] As some of these courts have noted, any other rule would permit a party to trifle with the courts. The party could deliberately stand by in silence and thereby permit the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable. [Citations.]" (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339, and cases cited therein; see also *In re Jesse W.* (2001) 93 Cal.App.4th 349, 355.) This policy applies full force to the instant case, as neither the court nor DCS was put on notice that reunification services were inadequate, even though Mother had ample opportunity to make such an objection. Although Mother filed a section 388 petition requesting "the facilitation of visitation with one or both of the minors, consistent with the desires of the children" in a therapeutic setting, Mother never complained the visitation order was inadequate. In fact, Mother repeatedly conceded to the visitation order. Thus, Mother's attempt to challenge the adequacy of reunification services is an attempt to raise a new issue which was not presented to the juvenile court. We find the

issue waived, and we need not consider it further. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 [" . . . '[a] party is precluded from urging on appeal any point not raised in the [juvenile] court'"].)

Even assuming Mother preserved this issue for appeal, we would find that reunification services to Mother were reasonable.

We review the correctness of an order pursuant to section 366.21 to determine if it is supported by substantial evidence. (*In re Shaundra L.* (1995) 33 Cal.App.4th 303, 316.) That standard requires us to determine whether there is reasonable, credible evidence of solid value such that a reasonable trier of fact could make the findings challenged. (*In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401.) In reviewing the reasonableness of the reunification services, we "recognize that in most cases more services might have been provided, and the services provided are often imperfect. The standard is not whether the services provided were the best that might have been provided, but whether they were reasonable under the circumstances." (*Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) A court-ordered reunification plan must be tailored to fit the circumstances of each family and designed to eliminate the conditions that led to the juvenile court's jurisdictional finding. (*In re Dino E.* (1992) 6 Cal.App.4th 1768, 1777.)

The record in this case, set out above, reveals the services offered were reasonable -- they were tailored to fit the circumstances and to eliminate the conditions that led to the juvenile court's jurisdictional finding -- and Mother consented to them. Mother was

present at the contested section 366.21, subdivision (f) 12-month review hearing on December 1, 2004, and did not argue that she did not receive reasonable services. On the contrary, Mother's testimony reflected that DCS provided Mother with adequate and reasonable reunification services, such as sending a social worker to her in Montana, providing her with referrals, and paying for her counseling sessions. Mother also testified that she was not asking that V.B. and B.B. be removed from their current home, acknowledging that they had a strong relationship with their paternal aunt. Mother's only request was that she be given a chance to "build a relationship with them, such that sometime down the road, years from now, they might come to Montana for a visit, just to see what it's like."

In addition, Mother's counsel conceded that reasonable services had been provided to Mother and that Mother was not asking the court to make an unreasonable-services finding. Mother's counsel also confirmed that Mother had agreed with the court's visitation orders and that Mother had accepted her boys' wishes that they did not want to see her. Mother's counsel confirmed that Mother's only request was for six more months of services in order for Mother to try to establish a relationship with her sons. However, no evidence was presented that an additional six months of reunification services would benefit the children.

Section 366.21, subdivision (g) provides that if the court does not return the child to the parent at the section 366.21, subdivision (f) hearing, the court may extend reunification services for up to six months if it finds a substantial probability that the

child will be returned to the physical custody of the parent and will be safely maintained in the home within the extended period of time. Given Mother's eight-year absence from the children's lives, her admissions and statements at the 12-month review hearing, the children's feelings and strong attachment to their relative caretakers, Mother's therapist's indication that Mother had limited insight into her past behavior that led to the loss of custody of her boys, the children's emotional distress as a result of seeing their mother, the relative caretaker's devotion towards the children, and Mother's husband's instability, there was not a substantial likelihood that the children would be returned to the physical custody of Mother and would be safely maintained in Mother's home if given an additional six more month reunification services. An additional six months for Mother to try to establish a relationship with the children she abandoned eight years earlier would mean the children's lives were still not permanently settled. Accordingly, substantial evidence supports the court's finding that there was no substantial probability that the children could be returned to Mother's custody within six months. (§ 366.21, subd. (g); *In re Shaundra L.*, *supra*, 33 Cal.App.4th 303, 316.)

We note that whenever a child is removed from parental custody, the juvenile court is required to provide reasonable reunification services (unless and until a statutory exception is determined to apply), and a normal part of reunification services is visitation between the parents and the child. (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1138.) Yet, while visitation is a key element of reunification, the court must focus on the best interests of the child and on the elimination of conditions that led to the juvenile court's

finding that the child had suffered, or was at risk of suffering, harm specified in section 300. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1376 ["[v]isitation arrangements demand flexibility to maintain and improve the ties between a parent or guardian and child while, at the same time, protect the child's well-being"].) This includes the possibility of adverse psychological consequences of an unwanted visit between parent and child. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 50-51; see also *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1237 [Court of Appeal affirmed an order providing that the children were not to be forced to visit with their parent against their will].) "[A] parent's liberty interest in the care, custody and companionship of children cannot be maintained at the expense of their well-being. [Citation.]" (*In re Julie M.*, at p. 50.)

Here, there was evidence that visits with Mother created emotional distress for V.B. and B.B., who were approximately four and two years old, respectively, when Mother abandoned them. V.B. had some memory of Mother and did not want to see her. B.B. had no memory of Mother and was ambivalent on whether or not he wanted to see her. After the boys saw Mother in May 2004, their therapy sessions had to be doubled each week as they suffered an increase in issues of abandonment and betrayal. Although it is sad that the efforts made by Mother could not result in a relationship or reunification with her sons, that outcome is not the result of a lack of reasonable reunification services, but rather of the boys' emotional state caused by Mother's abandonment and the experiences of their earlier lives. The juvenile court carefully considered the reasonableness of reunification services and the reasons why forcing the children to visit

with their mother was infeasible. The finding that Mother received reasonable reunification services is well supported.

III

DISPOSITION

The petition for extraordinary writ is DENIED. The stay imposed by order of this court on January 7, 2005, is lifted.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

KING
J.